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Supreme Court, U.S.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and BANK OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Theodore B. Gould, Pro Se
P.O. Box 6279
Charlottesville, VA 22906
(804) 295-7125

November, 1992

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QUESTIONS PRESENTED

Whether the invalidity of the creation of a liquidating trust for the fraudulent purpose of the avoidance of taxes and a bankruptcy court's appointment of a receiver under a confirmed plan's provisions may be shown in a collateral proceeding.

Whether the Constitution's Excessive Fines Clause prohibits a court's imposition of a coercive fine without consideration of the character and magnitude of the damage done by the continued contumacy.

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PETITION FOR WRIT OF CERTIORARI

Theodore B. Gould, appearing pro se, respectfully petitions for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Eleventh Circuit in this case. The court of appeals affirmed the authority of the United States District Court for the Southern District of Florida to exercise its civil contempt power to impose a coercive fine of $1,000 per day for the petitioner's failure to comply with the order of a bankruptcy court of the same district to turn over $66,500, the proceeds from the sale of certain personal property in the petitioner's possession, to a liquidating trust created under the provisions of a confirmed plan of reorganization for the purpose of avoiding the payment of income taxes.

OPINIONS OF OTHER COURTS

The judgment of the court of appeals affirmed, without an opinion (App. at 1a), the district court's order. The order of

the district court (App. 11a) is unreported. The bankruptcy court entered a contempt order (App. 38a) and a separate order certifying contempt under Rule 9020, Bankruptcy Rules (App. 45a), both of which are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992 (App. 1a), and a timely suggestion of rehearing in banc (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11th Cir. Civ. R. 35-6) was denied on September 3, 1992 (App. at 3a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 105 of the Bankruptcy Reform Act of 1978, as amended, provides

in part:

11 U.S.C. Section 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.
(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

2. Section 1123 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

11 U.S.C. Section 1123. Contents of Plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall --

....

(5) provide adequate means for the plan's implementation such as

....

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee.

3. Section 1129 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

> **11 U.S.C. Section 1129. Confirmation of Plan.**
>
> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (1) The plan complies with the applicable provisions of this title;
>
> ....
>
> (5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy.
>
> ....
>
> (11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of such debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

4. Section 401 of the Code of Crimes and Criminal Procedure [1988] provides in part:

> **18 U.S.C. Section 401. Power of Court.**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

5. Amendment VIII of the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

1. **The Bankruptcy Proceedings, the Liquidating Trust, and this Court's Judgment in** Holywell Corporation, et al. v. Smith, et al., 503 U.S. ____, 112 S.Ct. 1021, 117 L.Ed. 2d 196 (1992). -- This contempt case

is a result of the bankruptcy proceedings of the petitioner, the Miami Center Limited Partnership ("MCLP"), Chopin Associates ("Chopin"), Holywell Corporation ("Holywell"), and the Miami Center Corporation ("MCC"). Each of the debtors filed a separate voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida in response to foreclosure proceedings initiated by the Bank of New York ("BNY"), the construction lender for the development of the Miami Center, a mixed-use commercial real estate project in downtown Miami, Florida.

MCLP developed the Miami Center. Chopin owned the land underlying MCLP's development. MCC, a wholly-owned subsidiary of Holywell, and the petitioner were

general partners of MCLP and Chopin. Holywell was a limited partner of the debtor MCLP, and the parent stockholder of several solvent corporate subsidiaries[1], for no one of which proceedings were commenced by the filing with the bankruptcy court of petitions under a chapter of Title 11. The petitioner was also a limited partner of MCLP and at the commencement of the proceedings had partnership interests in several other entities[2] which owned property.

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[1] Holywell's nondebtor wholly-owned subsidiaries included Twin Development Corporation, Holywell Management of Washington, Inc., Orion Mechanical Services, Inc., Orion Cleaning Services of Washington, Inc., Whitehall Security Corporation, Holywell Leasing Company, and Holywell Telecommunications Company.

[2] On October 22, 1984, the bankruptcy court authorized Holywell and the petitioner, as stockholders and partners of the nondebtor entities, to consummate the sale of certain real and personal property in

On December 31, 1984, the bankruptcy court entered an order [C.P. No. 303], on BNY's emergency motion, to treat the proceeds of the sale of property ("Washington Proceeds")[3] as cash collateral, subject to the following conditions:

> (c) ...It will be necessary for Holywell to continue to provide these [administrative] services **until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.** (Emphasis added)

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northern Virginia and Washington, D.C. ("Washington Properties"). These sales were concluded in December 1984 and January 1985.

[3] The Washington Proceeds included the following cash earned in the Commonwealth of Virginia and District of Columbia:

Twin Development	$13,128,533
Holywell Management	1,913,000
Orion Cleaning Services	719,210
Orion Mechanical Services	338,730
Whitehall Security Corporation	573,060
Holywell Corporation	12,303,870
Theodore B. Gould	4,331,157
	$33,307,560

The Bankruptcy Court's order modified a prior order requiring the segregation of the cash proceeds derived from the sale and the issuance of an accounting after distribution of the proceeds by Touche Ross & Co.[4] The petitioner's estate held partnership interests in each of the selling entities.

On August 8, 1985, the bankruptcy court confirmed, **without** conducting a hearing, an amended reorganization plan proposed by BNY on the debtors' behalf. BNY's plan provided, inter alia, for the creation of the Miami Center Liquidating Trust ("Liquidating Trust") and the post-confirmation appointment of a trustee, who

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[4] The report issued on January 25, 1985 noted that the "...distributions are before federal income tax liabilities, if any, related to these transactions [and] any income tax liabilities will be the responsibility of the individual partners."

was assigned possession of Holywell's property and the Washington Proceeds, see Holywell, slip. op., p. 2[5] The bankruptcy court, having held that BNY's claim was "undersecured," 54 Bankr. 41 (Bkrtcy. S.D. Fla. 1985) and that the bank faced a "substantial loss now," Id. at 43, denied the debtors' objections [C.P. No. 534] that the plan's provision which substantively consolidated Holywell's property with MCLP's estate was a scheme to avoid the payment of income taxes, that the disclosure statement of BNY's amended plan did not provide adequate information to satisfy the requirements of 11 U.S.C. § 1125, and that the plan was not feasible, since adequate means were not provided for its

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[5] "The plan required the debtors to give up their interests in Miami Center and the proceeds from the sale of the Washington Properties, but otherwise permitted them to remain in business."

implementation.

On August 12, 1985, the bankruptcy court entered an order appointing Fred Stanton Smith as trustee of the Liquidating Trust and authorized the trustee to "[e]ngage attorneys, accountants and such further consultants. . . for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries." [C.P. No. 916][6] Thereafter, although the plan imposed a fiduciary duty on the trustee to manage

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6 The bankruptcy court has approved the following payments of fees and expenses to the trustee, his attorneys, and accountants:

Fred Stanton Smith (interim)	$ 126,625
Herbert Stettin, P.A. (interim)	444,753
Holland & Knight (final)	375,000
Wilmer, Cutler & Pickering (final)	163,000
Arthur Andersen & Co. (interim)	271,830
Total	$1,381,208

the property in his custody "in all other ways as would be lawful for any person owning the same to deal therewith...,"[7] the trustee sought and obtained indemnification from BNY. The indemnification was granted prior to commencement of distribution under the plan, for the trustee's actions regarding the Miami Center's sale. The trustee was to be held personally harmless "for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing...." Answers of Wolff to Interrogatories.[8]

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[7] See Art. V, 3(w); also In re Holywell Corp., 911 F.2d 1539, 1547 (11th Cir. 1990)

[8] On May 15, 1987, the original presiding bankruptcy judge held an ex parte conference with the trustee and Mr. Wolff, (then a partner of Holland & Knight), at which Mr. Wolff was dismissed as the

The trustee also sought and obtained indemnification for his actions in implementing the plan's provisions, wherein he allowed BNY to take a credit of $27,050,115 for postpetition interest on its undersecured claim and thereafter disbursed the cash of Holywell, and its nondebtor subsidiaries, to pay the unsecured claims of general creditors against MCLP, without first establishing a reserve for the payment of taxes on the income attributable to the property of the corporations in his custody.

On January 29, 1986, the bankruptcy court amended its Confirmation Order nunc pro tunc, adopting verbatim the factual

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trustee's attorney, because "...Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan...is defective." Transcript, p. 3.

findings proposed by BNY as the prevailing party,[9] including the following relevant conclusions of law:

> 62....Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example: (a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner),...(iii) Holywell's assets (**net of its liabilities**), by **levying upon Gould's ownership of 100% of the stock of Holywell....** (Emphasis added)
>
> 66....There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately $17 million in Federal income taxes." [C.P. No. 580, p. 2]

The district court affirmed the confirmation order.[10] The Eleventh Circuit

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9 Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547, 1551, n. 4 (11th Cir.), cert. denied, 488 U.S. 823 (1988)

10 See Holywell Corp. v. Bank of New York, 59 Bankr. 340, 353 (S.D. Fla. 1986).

subsequently vacated the district court's order and dismissed the debtors' appeal of the confirmation as moot because the plan had been substantially consummated and effective relief could not be granted.[11]

On April 28, 1988, the bankruptcy court granted declaratory relief to the trustee from the statutory obligation to file or pay income taxes related to the plan's implementation, having previously

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[11] Having granted deference under the "clearly erroneous" standard to the bankruptcy court's adoption of BNY's proposed findings of fact, citing Anderson v. Bessemer City, 470 U.S. 564 (1985), the Eleventh Circuit held in part:

> The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated, and that its fairness, feasibility, and propriety had been verified.... Miami Center, 838 F.2d at 1557.

instructed Herbert Stettin, the attorney who had replaced Irving M. Wolff, Esq., to draw the court's order.[12]

The trustee's attorney drafted the court's order, without circulating the proposed draft to opposing counsel and after engaging in ex parte communication bankruptcy court,[13] in which it was held

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12 On April 11, 1988, the bankruptcy judge in Smith v. United States, et al., informed the parties of the court's decision and held as follows:

> ...By virtue of the fact that this is a declaratory [judgment] on behalf of the Trustee, I am making no decision on liability on behalf of the Bank of New York, Gould, or Holywell....

13 The degree to which the judicial process was abused by the bankruptcy judge's ex parte communication with the trustee's attorney is illustrated by the court's adoption of the factual finding that the separate plans filed on behalf of Holywell and the petitioner's estate did not "... provide[d] for the payment for federal income taxes, if any, due on the gain realized from..." the sale of the Washington Properties and the Miami Center. In

that the Liquidating Trust was a grantor trust and the debtors were liable for payment of the taxes as grantors of a trust.[14]

Although the district court affirmed the bankruptcy court's declaratory judgment, this Court reversed the Eleventh Circuit's divided opinion that the trustee

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fact, Holywell's plan estimated that taxes in the amount of $15,000,000 would be payable with a priority superior to the distribution to unsecured creditors, and the plan filed on the petitioner's behalf estimated taxes of $7,290,000 would be payable in liquidation of the estate's various partnership interests.

14 The bankruptcy court's judgment concluded in part:

> The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan...A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. 85 Bankr. 898, 903 (Bankr. S.D. Fla. 1988)

did not breach his duty under the terms of the plan or other statutory provisions.[15]

This Court held in part:

> We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because Section 6012(b)(3) requires him to make a return as the "assignee" of the "property...of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because Section 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." Holywell, slip op., p. 3.

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[15] The Eleventh Circuit had previously affirmed, without argument and issuance of a written opinion, In re Holywell Corporation, No. 88-6187, July 7, 1989, cert. denied, ___ U.S. 1990, the district court's judgment, 93 B.R. 780 (S.D. Fla. 1988), affirming the bankruptcy court's dismissal of an adversary complaint alleging that the trustee breached his fiduciary duty and was negligent, inter alia, in (1) granting BNY a credit of $27,050,115 in postpetition interest on its undersecured claim against MCLP's estate and (2) the failure to establish a reserve for the payment of income taxes prior to the use of the cash of Holywell, and its subsidiaries, to pay claims against MCLP.

2. This Contempt Proceeding -- The trustee's motion for contempt and other relief (App. at 48a), sought an order certifying that the petitioner was in contempt of the bankruptcy court's "Order of Confirmation and the provisions of Section 1142 of the Bankruptcy Code," (App. at 55a) for refusing to turn over the proceeds of the sale of the concrete pumps on June 2, 1989. The petitioner conveyed title and possession to the buyer. The trustee did not assert that he had the authority to convey title.[16]

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[16] The trustee testified under oath in the tax case that his duties and control of the property of the estates in his custody were limited to the functions of a disbursing agent and a "contract trustee":

MR. STETTIN: "...do you have any other control of any other property other than money of the consolidated debtors?"

MR. SMITH: "No, I do not...."

On August 1, 1989, the bankruptcy court entered a Contempt Order against the petitioner, drafted by the trustee's attorney and submitted in an ex parte communication with the bankrupcy judge,[17] in which the petitioner was directed to turn over the sale proceeds to the trustee no later than July 31, 1989 (App. at 41a).

At the hearing on July 27, 1989, the petitioner informed the court that the

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MR. STETTIN: "Have you done anything except hold title to the money and determine the validity, priority and amount of the claims against the consolidated debtors?"

MR. SMITH: "That's all I have done." Transcript, February 11, 1988, p. 87.

[17] The bankruptcy court's ex parte communication with its agents and attorneys as a common practice, is a violation of **Rule 9003, Bankruptcy Rules**, and **Canon 3A(4)** of the **Code of Judicial Conduct**: "A judge should...neither initiate nor consider ex parte communications concernig a pending or impending proceeding."

sale proceeds would not be paid to the trustee, since the trust had been formed for the unlawful purpose of avoiding the payment of taxes and complying with the court's order would cause the case to be moot.[18]

The court imposed a coercive fine of $1,000 for each day from and including August 1, 1989, payable into the court registry, until $66,500 plus interest was paid to the trustee (App. at 41a).

On August 14, 1989, the bankruptcy court entered an order certifying the petitioner to be in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure for failure to comply with its

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[18] In re Cordova Gonzalez, 726 F.2d 16, 21 (1st Cir. 1984), cert denied, 466 U.S. 951

prior order. (App. at 45a) The petitioner filed timely objections to the order of contempt (App. at 57a).

The petitioner's objections stated, inter alia, that the bankruptcy court lacked the statutory authority to appoint a trustee granted the powers of a receiver and vested with title to the individual debtor's bankruptcy estate, while relieving such a trustee of the duty to discharge requirements of law, specifically, the payment of federal and state income taxes, that the creation of the Liquidating Trust was for the unlawful purpose of avoiding the payment of taxes, that an unlawful contract is not enforceable, and that the value or sale proceeds of the concrete pumps was not enumerated as an asset required for the implementation of the Bank's plan.

On May 17, 1991, the district court entered its contempt order, and imposed a coercive daily fine of $1,000 payable to the court registry for failure to comply with its order to turn over the sale proceeds of the concrete pumps to the trustee. (App. at 26a)

The court of appeals affirmed, without an opinion concerning the invalidity of the creation of a trust to avoid taxes, having treated the mandate of this Court's Holywell judgment as "water over the dam," 11th Cir., Transcript, June 23, 1992,[19] and without consideration of this Court's

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[19] This Court's mandate was issued as of February 25, 1992, and directed the Eleventh Circuit to remand the cause for hearings in conformity with its Holywell opinion. The Eleventh Circuit remanded the case to the district court on July 8, 1992, and its mandate issued on August 7, 1992. The district court has not scheduled the remanded hearings.

precedent limiting a court's discretion to impose a fine to coerce compliance with its orders.

REASONS FOR GRANTING THE WRIT

An important consideration in this case is the degree to which the public interest would have been damaged if the petitioner had not used the cash, which the district court's contempt order required that petitioner turn over to the trustee, to pay attorneys' fees related to filing a petition for writ of certiorari in the appeal of the Eleventh Circuit's tax opinion. The case would have been closed. The Bank's scheme to avoid taxes would have been successful, and the unpaid taxes would have been uncollectible.[20]

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[20] A precedent would have been established which the Solicitor General has described in the following terms:

The Eleventh Circuit's mootness doctrine would have disposed of questions related to the tax effects of the Bank's plan and the plan's feasibility.[21] The Miami

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> The decision of the court of appeals creates a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. **Brief For The United States,** p. 13.

In fact, prior to the issuance of this Court's Holywell opinion, it was a common practice for bankruptcy judges to confirm plans which did not provide for the payment of income taxes arising from the sale of the estate's property, and, since the Bankruptcy Code relieves a trustee appointed in a case under title 11 of personal liability for the taxes, penalties and interest, 11 U.S.C. § 1106(a)(6), when the case is closed, the Internal Revenue Service has no legal means of collecting the taxes.

[21] "We...conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is

Center mootness doctrine would also have disposed of questions concerning the Bank's scheme to defraud the United States.[22]

The district court's order was entered prior to the issuance of this Court's opinion in Holywell, reversing the court of appeals' judgment, in which it was held that the liquidating trustee did

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therefore barred." In re Holywell Corp., 911 F.2d at 1543.

[22] "In dismissing the debtors' previous challenge, this court was guided by the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. Miami Center Limited Partnership, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The district court is correct in the ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine." Id.

not "...breach his duty under the terms of the Plan or other statutory provision...to file income tax returns or pay taxes," 911 F.2d at 1546.[23]

In Holywell, this Court agreed with the petitioner that, as the assignee of the corporation's property, the trustee must file its returns and pay the taxes on income attributable to the corporation's property, and further that "the trustee must file a return because he is the fiduciary of a trust of an individual," slip op, p. 6. This Court also concluded that

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[23] The court of appeals also concluded pertinent to this case:

> Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes. Id. at 1545.

"The trustee...is not acting as the fiduciary of Gould's bankruptcy estate," id. at p. 7, and held that Smith acted as the fiduciary of a trust, id., quoting the Treasury Regulations defining the term "fiduciary" used in 26 U.S.C. § 7701(A)(6).[24]

The court of appeals' decision affirming the district court's authority to exercise its contempt power has sanctioned breach of fiduciary duty, negligence, and unlawful actions of a

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[24] "'Fiduciary' is a term which applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers. 26 CFR Section 301, 7701-6. Id. at slip op., pp. 7-8.

federally-appointed officer.[25] The consequence of this Court's opinion in Holywell require the conclusion that the

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[25] See King v. United States, 379 U.S. 329, 337 (1964) paraphrasing Bramwell v. United States Fidelity & Guaranty Co., 269 U.S. 483, 488 (1926) citing Beaston v. Farmers' Bank, 37 U.S. (12 Pet.) 102 (1838). The manner in which the Absolute Priority Statute operates has been described apart from the inapplicable exception in this case for the Bankruptcy Code, as follows:

> From the language employed in this section, and the construction given to it, from time to time, by this Court, these rules are clearly established: first, that no lien is created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. 37 U.S. (12 Pet.) at 133-134).

bankruptcy court lacked authority to confirm the Bank's amended plan, and "neither the approval or the confirmation of [such] a plan can stand." Protective Committee v. Anderson, 390 U.S. 414, 435,441 (1967). The Bank's plan is not feasible,[26] and the bankruptcy court did not "...assure itself reorganization will succeed, Section 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax owed." United States v. Energy Resources

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[26] The trustee's attorney conceded in the tax case before this Court that the Bank's plan is not feasible:

QUESTION: No, but I'm still asking you, supposing they had acted with due diligence, what would have happened?

MR. STETTIN: The plan would not have been confirmable because one of the requirements under section 1129 is that the plan be shown to be capable of successfully being carried out.

Supreme Court, Holywell, Transcript, p. 23.

Co., 110 S.Ct. 2139, 2142 (1990).[27] More-

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[27] The burden of proof concerning a determination of the plan's future tax effects was on the Bank as the plan's proponent, "in the preparation and judicial approval of [the] reorganization plan...by which the fairness and feasibility of the plan [could] be ascertained," W. T. Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws - Tax Procedures, 99 HARV.L.REV. 1360, 1467 (1975). However, the Bank did not request that the bankruptcy court estimate the amount of the tax liabilities arising from the plan's implementation and did not seek a private ruling from the IRS for a declaration of the tax effects of its amended plan prior to confirmation. See S. Rep., No. 1106, 95th Cong., 2d Sess 28 1978). Instead, the Bank's position was that the IRS had not protected the interests of the United States and its pleading before this Court stated, in relevant part, as follows:

> Having failed to exercise the requisite diligence in bankruptcy court, the IRS now advances a strained statutory argument in an effort to collect the debtors' taxes from **funds that the plan of reorganization explicitly reserves for other creditors....** [T]he IRS should not be permitted to absent itself from the negotiating table and then demand a form of super-priority payment after the plan has been confirmed. Id. at pp. 11-12. (Emphasis added) **Brief In Opposition Of Respondent The Bank of New York**, pp. 11-12.

over, the Bank's plan did not comply with 11 U.S.C. § 1129(a)(1), namely § 1122, and did not satisfy the Fair and Equitable Standard. In re Holywell Corp. (Miami Center Joint Venture v. Bank of New York), 913 F.2d 873, 879-88) (11th Cir. 1990).

The court of appeals has adopted a common law mootness standard without constitutional or statutory authority to dismiss the debtors' appeal of the bankruptcy court's confirmation order, Miami Center, 838 F.2d at 1553;[28] a plan has

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[28] The court of appeals has relied on the Miami Center mootness doctrine to dismiss the debtor MCLP's right to recover postpetition interest of $27,050,115 which the trustee allowed the Bank to take as a credit, having sought and obtained indemnification for his conduct, because "the credit is now lawful in the sense that it is an integral component of the confirmed Plan...." In re Holywell Corp., (Miami Center Limited Partnership v. Smith), No. 88-151-Civ-Aronovitz (S.D. Fla., July 21, 1988), appeal dismissed, No. 88-5770 (11th

been implemented which does not satisfy the requirements of the Fair and Equitable Standard;[29] and the court's contempt power

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Cir., January 9, 1991), cert. denied, ___ U.S. ___ (1991).

The court of appeals also used the Miami Center mootness doctrine to deny MCLP's right to recover an estimated $8.7 million in interest which the Bank unilaterally determined to be payable under the contract documents. The Eleventh Circuit held in part:

> It might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court.... Altering the amount of interest would change the amount of the judgment lien, which in turn would modify the terms of the sale to the Bank, to which the Bank agreed....This would strike at a crucial element of the reorganization plan....The amount of interest...was included in the Bank's bargain for the purchase of the project, which constituted a large part of the confirmed plan.

In re Holywell Corp. (Miami Center Limited Partnership v. Bank of New York), 901 F.2d 931, 933 (11th Cir. 1990), cert. denied, 111 S.Ct. 713 (1991).

29 See United States v. Key, 90 S.Ct. 1049 (1970): "This court has long held that ...the words 'fair and equitable'...in no

has been used to deter petitioner from raising in collateral proceedings the issue of the trustee's personal liability for breach of fiduciary duty related to the failure to pay taxes and commingling the accounting of the estates in his custody.

1. The Invalidity of the Bankruptcy Court's Appointment of a Receiver is a Jurisdictional Issue Which May Be Shown in a Collateral Proceeding -- This Court has held that there are certain strictly jurisdictional facts "...the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity," Noble v. Union River Logging Railroad Co., 147 U.S.

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way authorize a district court to evade priorities otherwise granted by law...and it ...cannot be taken to exclude by implication an explicit statutory priority, such as that granted to the United States." 90 S.Ct. at 1052.

165, 173 (1892), and cited Griffith v. Frazier, 8 Cranch 9, 23 (1814) for the principle that if a court lacked authority to appoint an officer of the court to administer an individual's estate, then the judgment of the court must fail for want of jurisdiction and its invalidity may be shown in a collateral proceeding. In such a case, Griffith held that the court's appointment is void ab initio and all of the trustee's acts as the court's agent are also void. 8 Cranch at 27.

The plain language of 11 U.S.C. § 105(b) limits the power of a court in a bankruptcy proceeding and specifically prohibits the appointment of a receiver in a case under title 11. As the Seventh Circuit Court of Appeals held in a pertinent discussion of Section 105(b):

> As the legislative history explains, "the bankruptcy code has ample provision for the appointment of a trustee [i.e., under Section 1104] when needed. Appointment of a receiver would simply circumvent the established procedures."

In re Memorial Estates, Inc., 797 F.2d 516, 519 (1986).[30]

As the plan's proponent, and a party in interest, the Bank could have requested the appointment of a trustee in a case under title 11 at any time after commencement of the case, but before confirmation of the plan, in accordance with the Best Interests Standard defined in 11 U.S.C. § 1104(a)(2). The duties of such a trustee would have included filing tax returns required by law in accordance with 11

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[30] See also Notes of Committee on the Judiciary, Senate Report No. 95-989: "...the bankrutpcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances...."

U.S.C. § 1106(a)(6). No question would have arisen about whether the liquidating trustee was required to file the returns as a fiduciary under 26 U.S.C. § 6012(b).

The intent of Congress in limiting a bankruptcy judge's authority to appoint a receiver was to remove the court from the criticized practice under the pre-Code Bankruptcy Act of appointing an officer that would appear in litigation before the court against an adverse party.[31]

In Spring Valley Water Co. v. San Francisco, 246 U.S. 391, 395 (1918), this Court defined the term "receiver" as "...embracing any person acting as [an] agent or depository of funds for a court."

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[31] Subsection (c) of 11 U.S.C. § 1104 grants authority to the United States trustee to select and appoint a trustee or examiner which a court has ordered to be appointed.

Although this Court's Holywell opinion does not resolve the question of whether the trustee appointed under the provisions of the Bank's plan is a receiver, if the trustee is entitled to receive and hold the income from the sale of the concrete pumps, acting on behalf of an estate of which the petitioner is the beneficial owner, then the trustee must be deemed a receiver under this Court's Spring Valley definition and under the common usage of the term as defined in Black's Law Dictionary, Vol. v, p. 1140.[32]

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[32] A "receiver" is defined, in relevant part, as follows:

> A ministerial officer, agent, creature, hand, or arm of, and a temporary occupant and caretaker of the property for the court, and he represents the court appointing him, and he is the medium through which the court acts.... He is a trustee or ministerial officer representing court, and all parties in interest in litigation, and property or fund entrusted to him."

This Court's Holywell opinion concludes that the Bank's plan "created a separate and distinct trust holding the property of the estate and gave the trustee control of this property" in accordance with 11 U.S.C. § 1123(a)(5)(B), slip op, p. 7. However, the question of whether "the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation," slip op., p. 6, was not resolved.

The resolution of this question is the threshold jurisdictional issue in this contempt case. The district court's conclusion that "Article V of the plan... provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan" (App. at 11a) does not resolve the question of whether the bankruptcy court had

statutory authority to appoint a receiver under the provisions of a creditor's liquidating plan and to force the debtor to engage in unlawful conduct and cooperate with such an agent in compliance with the plan. (App. at 10a)

Various courts have held that "while not expressly recognized by the Code, a liquidation agent named by the plan proponent, with duties and manner of compensation set out in the plan, is an appropriate party to effectuate a liquidation plan."[33] In Jorgensen, the BAP of the

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[33] See In re Schultz, 69 B.R. 629, 631 (D.S.D. 1987), citing In re Jorgensen, 66 B.R. 104, 108 (9th Cir. BAP 1986):

> A liquidating and disbursing agent named in the liquidating plan is an appropriate entity for carrying out a liquidating plan....Several Code sections support a bankruptcy court's power to appoint or approve a

Ninth Circuit defined the authority of such a liquidation agent as follows:

> The appointment of the liquidating and disbursing agent is consistent with Section 1123(b)(5). Traditionally, courts have appointed agents to make disbursements pursuant to plans, the function of a trustee with limited powers. Here, the property of the estate does not vest in the debtors until such time as all claims are paid in full. 66 B.R. at 108.

The problems arising from avoiding the statutory prohibition on a court's authority to appoint a receiver by referring to the court's officer as a "liquidating and disbursing agent" have been illustrated in this case. See In re

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> liquidating agent. See 11 U.S.C. Section 105(a), 327(a), 1123(b)(5).... Any actions taken by such an agent can be enforced by the bankruptcy court...."

See also In re Rolling Green Country Club, 26 B.R. 729 (Bkrtcy. D. Minn. 1982); In re Sonner, 53 B.R. 859 (Bkrtcy. E.D. Va. 1985); In re Chase & Sanborn, 58 B.R. 721 (Bkrtcy. S.D. Fla. 1986); In re Southern Industrial Banking, 71 B.R. 351 (Bkrtcy. E.D. Tenn. 1987)

Holywell Corp., 911 F.2d at 1546.[34] The Eleventh Circuit concluded that "...neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes," Id., having relied upon the following pertinent analysis:

> In deciding whether to extend the provisions of section 6012, we find In re Allen Wood Steel Co., 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980) instructive. In In re Allen Wood Steel Co., the bankruptcy court refused to extend the provisions of section 6012 to a disbursing agent under facts similar to this case. We agree with the district court that section 6012 does not apply to a liquidating trustee and rely on its analysis...."

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[34] The majority opinion of the Eleventh Circuit held, in relevant part, as follows: "First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather han an assignee or fiduciary." 911 F.2d at 1546.

In Bull v. United States, 295 U.S. 249, 260 (1935), this Court held that taxes are the "life-blood" of government. However, more than seven years have elapsed since the bankruptcy court confirmed the Bank's amended plan and the trustee took possession of substantially all of the property of the debtors' estates.[35] Nevertheless, federal and state income taxes have not been paid.[36]

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[35] The trustee took possession of assets with a fair market value of $338,123,076 as of October 10, 1985, including cash and securities in the amount of $37,488,326, the right to repayment of certain super-priority loans authorized by the bankruptcy court in the amount of $4,827,937. The trustee has also received postconfirmation income on behalf of Holywell and the petitioner's estate in the amount of $19,605,219 in interest, judgments and partnership distributions as of June 30, 1992.

[36] The IRS Final Report, issued on July 13, 1992, to Fred Stanton Smith, as assignee of Holywell Corporation's property, has assessed corporate income taxes of $20,695,806 plus penalties for negligence

Notwithstanding that the intent of Congress in enacting the injunctive provisions of the predecessor of 11 U.S.C. § 524(a)(2) was to stop the abuses arising from the commencement of lawsuits against debtors[37] "who were unable to obtain counsel because bankruptcy had stripped them

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and late payment in the amount of $5,975,648. (App. 116a)

The Commonwealth of Virginia has issued a Final Assessment for taxes, penalties, and interest in the amount of $3,791,098.84 as of July 31, 1992.

As of July 31, 1992, the trustee had misappropriated $18,710,000 in cash of Holywell and its subsidiaries to pay claims against MCLP's estate (App. at 124a).

[37] The trustee has filed various lawsuits against Holywell and the petitioner to determine his rights and protect himself from lawsuits alleging breach of fiduciary duty and negligence in the management of the property in his fiduciary custody, namely, (a) failure to establish a reserve and pay federal and state income taxes; (b) allowing the Bank to take a credit of $27,050,115 in postpetition interest on its undersecured claim; (c) conveying the property without consideration and failure to collect the accounts receivable of HTC and HLC in the amount of $11,932,793 as of

of their assets," Brown v. Felsen, 442 U.S. 127, 135 (1979), the petitioner has been forced to borrow funds and incur substantial liabilities to pay attorneys' fees to defeat the Bank's scheme to avoid the payment of taxes and to pay accounting expenses to segregate the assets and liabilities which the trustee and his accountants commingled.[38] (App. at 124a)

The legislative history of the Bankruptcy Code reflects the public policy

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October 10, 1985; and (d) misappropriation of the cash of Holywell, and its nondebtor subsidiaries, engaged in business in Virginia and the District of Columbia, to pay claims against MCLP without first paying their income tax liabilities.

[38] The trustee's conduct in these proceedings should be compared with the general rule that a trustee in his administration of a trust is under the duty of acting exclusively and solely in the interest of the trust estate or the benficiaries, within the terms of the trust, and is not to act in his own interest or in the interest of a third person. 76 AM Jur 2d Trusts Section 316

that the bankruptcy laws should not be applied in a manner to avoid taxes:

> [T]ax collection rules for bankruptcy cases have a direct impact on the integrity of the Federal, State and local tax systems. These tax systems generally based on voluntary assessment, work to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their tax debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers.[39]

11 U.S.C. § 1123(a)(7) prohibits the appointment of a trustee under the provisions of a plan in a manner which is inconsistent with public policy. Furthermore, the authority of a court to confirm a plan is limited by the enumerated requirements of § 1129(a) and specifically

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39 S.Rep. No. 989, 95th Cong., 2d Sess. 13-15 (1978)

requires that the appointment of a trustee or any successor to the debtor is consistent with public policy, Section 1129(a)(5)(A).

This Court has made the test of a plan's feasibility the principal determinant limiting a bankruptcy court's jurisdiction in tax matters. As previously explained, the determination of a plan's feasibility imposes a duty upon a bankruptcy court to assure itself that the future tax effects of a plan will be satisfied, the tax collector paid, and that the debtor will have a "fresh start."

In this case, the bankruptcy court concluded that "The payment of federal income taxes would, of necessity, be an impermissible modification of the confirmed plan,"85 B.R. at 903, because the

court construed the provisions of the Bank's plan under which the Liquidating Trust was created and a trustee appointed as relieving the trustee of the duty to pay income taxes.

2. A Court Will Not Enforce a Contract Made to Defraud the Law and a Trust Created for the Fraudulent Purpose of Avoiding Taxes is Unlawful -- The degree to which the proceedings have departed from the judicial standard is illustrated by the court of appeals' affirmance of the district court's exercise of its contempt power based on concluding that the Bank's plan is a binding contract (App. at 19a) and that the trustee's refusal to pay income taxes was not relevant. (App. at 20a)

This Court's historical precedent precludes a court from enforcing a con-

tract entered in fraud of a law of the United States. A contract made contrary to law is an act in fraudem legis, and in Hannay v. Eve, 3 Cranch 241 (1856), Chief Justice Marshall's opinion stated, in relevant part, as follows:

> [A] contract being clearly in fraud of the law...a law to which, under the circumstances attending to it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. 3 Cranch at 247.

This fundamental rule was restated in Craig v. State of Missouri, 41 Peters 408, 436 (1830) and Bank of the United States v. Owens, 27 U.S. 527, 538 (1829)[40] Similarly, this Court held in United States v. Mississippi Valley Generating Co., 364 U.S. 520, 563 (1961), that "a statute

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[40] "Courts are instituted to carry into effect the laws of a country, how can they become auxillary to the consummation of violations of law?" 27 U.S. at 538

frequently implies that a contract is not to be enforced when it arises out of circumstances that lead enforcement to offend the essential purpose of the enactment."

It is also a fundamental rule that a court will not sanction conduct or enforce contracts injurious to the state and public interest. The Restatement of Trusts provides in Section 63(1) that a trust is invalid if the purpose of the settlor in creating the trust is to defraud creditors, and Scott on Trusts states that where a trust is made to avoid taxes or otherwise to defraud the government, the trust is unlawful and will fail.[41]

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[41] BNY has stated that "Even a cursory review of these documents [i.e., the Bank's plan and disclosure statement] would have revealed that no provisions were included in the plans for payment by the Liquidating Trust of any taxes resulting from the disposition of the debtors'

the rationale for creation of a liquidatng trust as follows:

> The IRS's own Revenue Ruling indicates that the Liquidating Trust, even if determined to be liable for taxes, would not have been liable for any federal income taxes relating to the Miami Center project since its basis in any property was equal to its sale price. Rev. Ruling 63-228, 1963-2 Cum. Bull. 229.....In that Ruling, assets were transferred from a bankrupt's estate to a trust established for the benefit of creditors. The Ruling viewed the transfer to be a transfer in satisfaction of the creditors' claims. Since the Trust took the Miami Center Project for the benefit of creditors at its fair market value and simultaneously disposed of it at the same time, no gain was realized by the Liquidating Trust in any event. Id. at 23.

BNY also explained that "...the Liquidating Trust is a grantor trust for federal income tax purposes [and] ... is not subject to tax; however, the grantors, i.e., the Debtors, may be subject to tax on

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property," 11th Cir., Answer Brief, Smith v. United States, et al., p. 25.

their income."[42] The trustee adopted this position and stated:

> The Miami Center Liquidating Trust is a grantor trust as defined under subpart E of subchapter J of the Internal Revenue Code, 26 U.S.C. Sections 671-79. The trust thus has no responsibility to pay the Debtors' taxes. The beneficial owners of the trust, the Debtors in this Chapter 11 proceeding, are taxed separately.

Notwithstanding the conflict with the precedent of the Ninth Circuit in Richardson v. The United States of America, 552 F.2d 291 (9th Cir. 1977) and De Pinto v. United States of America, 585 F.2d 405 (9th Cir. 1978), the courts below sanctioned this injurious policy, although the Ninth Circuit held that the filing of a petition in bankruptcy is not a donative act of the settlor of a trust.

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[42] S.D. Fla., Consolidated Answer Brief, Smith v. United States, et al., p. 15.

This Court has held that the facts in In re Sonner, 53 B.R. 859 (E.D. Va. 1985), which applied the grantor trust provisions to a liquidating trust created under the provisions of a confirmed plan, were distinguishable from this case. Holywell, slip op., p. 8. However, satisfying the public interest in the administration of the tax and bankruptcy laws requires eliminating the degree to to which the creative genius of attorneys may use the technical considerations of the law of trusts to avoid the payment of taxes.[43]

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[43] It has been estimated that approximately 20 to 30 percent of Chapter 11 cases are liquidations. Recent Chapter 11 cases involving a "liquidating trust" have included Toren v. Braniff, Inc., 893 F.2d 763, 765 (5th Cir. 1990); In re Goldblatt Bros., 106 Bankr. 522 (Bankr. N.D. Ill. 1989); In re Highway Equip. Co., 120 Bankr. 910, 911 (Bankr. S.D. Ohio 1990); In re Crowthers McCall Patterns, Inc., 120 Bankr. 279, 283 (Bankr. S.D. N.Y. 1990); In re Mako, Inc., 120 Bankr. 198, 200 (Bankr. E.D. Okla. 1990); In re Mortgage

The Bankruptcy Code provides for liquidation under Chapter 7. Allowing the creation of a liquidating trust as a grantor trust under a liquidating plan proposed in Chapter 11, in which all of the assets of a debtor's estate are vested in a liquidating trust, defeats the priority for the distribution in liquidation of the property of a debtor's estate in accordance with 11 U.S.C. Section 726.

In this case, absent the creation of the Liquidating Trust and substantive consolidation of the debtors' estates,

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Inv. Co., 111 Bankr. 604, 609 (Bankr. W.D. Tex. 1990). The bankruptcy court's opinion in Sonner illustrates the degree to which the public interest has been damaged ("Courts which have determined that a [liquidating] trustee may not be taxed pursuant to section 960 have held the tax to be an impermissible burden upon the liquidation process." 53 B.R. at 866)

based on the petitioner's ownership of Holywell's capital stock,[44] to create a "common pool of assets to pay all claims" (App. at 124a), the distribution of the proceeds from the sale of all of the property of the estates of Chopin and MCLP in liquidation would have caused the principal amount of MCLP's unsecured creditors

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[44] The bankruptcy judge explained the consolidation of the debtors' estates as follows:

> ...the predicate for the assertion that the assets of Holywell properly are subject to the claims of the other entities is the link through Gould. If Gould, in fact, controls, and I assume tha the word "controls" also is "owns," I mean "own and controls," has the power to dispose of the assets of Holywell and if he simultaneously, in the same capacity, is indebted to those other entities, isn't that the same thing as saying that Holywell is indebted to those others.

During the substantive consolidation hearing, the bankruptcy court acknowledged that "...there might be adverse tax consequences..." as a result of implementation of BNY's Plan.

to be paid prior to payment of the Bank's postpetition interest, which would have had a priority superior only to MCLP's equity. Holywell and its subsidiaries would have had adequate cash to pay their federal and state income taxes.

Instead the Liquidating Trust's creation as a separate taxable entity, and the treatment of the transfer of the assets of the individual debtor's estate as a sale in exchange for the discharge of indebtedness, failed to preserve the NOLs as property of the petitioner's estate and has caused the imposition of an alternative minimum tax of $1,147,545 on the individual debtor's bankrutpcy estate. Furthermore, the failure to preserve the estate's partnership interest in the Miami Center Joint Venture's NOLs has caused an additional tax burden of an estimated

$2,150,000 payable for income earned in 1991.

3. A Court's Discretion to Impose a Fine to Coerce Compliance with its Orders Is Limited and the Constitution's Excessive Fines Clause Has Been Violated -- The court of appeals' affirmance of the district court's contempt order is contrary to this Court's precedent defining the limits of a court's authority to exercise its civil contempt power in accordance with the Constitution's Excessive Fines Clause.

The district court's contempt order must be reversed because of the degree to which this contempt proceeding has departed from the standard in Bloom v. Illinois, 391 U.S. 194 (1968), cited by Justice Scalia in his concurring opinion in Young, et al. v. United States ex rel.

Vuitton et fils, 481 U.S. 418, 823 (1987):

> First, it [Bloom] eliminates this Court's only holding that the courts must have autonomous power to hold litigants in contempt as a means of enforcing their judgments. And second, it makes clear that the argument from necessity to the existence of an inherent power must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty.

The plain language of 18 U.S.C. § 401 limits a court's discretion to punish by fine contempt of its authority, and "...none other, as...(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The threshold question in this case is whether the turnover orders of the bankruptcy court and district court are lawful decrees issued within the court's statutory authority to exercise jurisdiction. 28 U.S.C. § 1334 grants a district court original and exclusive jurisdiction

of all cases under title 11 and exclusive jurisdiction of all of the property of a debtor's estate as of the commencement of the case. 28 U.S.C. § 157(b) grants authority to a bankruptcy judge to hear and determine all cases under title 11 arising, inter alia, from matters concerning administration of the estate, turnover of the estate's property, avoidance of fraudulent conveyances, and the sale of the estate's property.

This case concerns a transaction involving the sale of property after confirmation. The trustee did not succeed to physical possession, custody or control of the concrete pumps at the commencement of the proceedings. (App. at 38a) The petitioner conveyed title of the property to the Buyer under the provisions of a

special warranty deed.

The bankruptcy court relied on a provision in the Bank's plan to exercise jurisdiction to issue its turnover order, Art. XIV, Retention of Jurisdiction, p. 41, notwithstanding that the plan's reservation of jurisdiction is limited to matters related to the determination of timely filed preconfirmation claims of creditors, see Holywell, slip op., p. 10, and "any orders which may be necessary or appropriate to carry out the plan's provisions.

In United States v. City of Yonkers, 856 F.2d 644, 659 (2nd Cir. 1988), the Second Circuit held that "...the law of contempt exerts some outer limits on the normally 'wide discretion' of a district court to fashion appropriate remedies to

secure compliance with its lawful orders." Similarly, this Court's opinion in Spallone v. United States, 110 S.Ct. 625, 633 (1990), citing the Second Circuit's opinion in Yonkers, 856 F.2d at 454, quoting Anderson v. Dunn, 6 Wheat 204, 231 (1821), stated as follows:

> ...the use of the contempt power places a[n]...limitation on a district court's discretion, for as the Court of Appeals recognized, "in selecting contempt sanctions a court is obliged to use the 'least possible power adequate to the end proposed."

The limits of a court's discretion to impose a fine to coerce compliance with its lawful orders are explained in United States v. United Mine Workers, 330 U.S. 258, 303 (1946), in relevant part, as follows:

> ...where the purpose is to make the defendant comply, [the court]...**must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable**

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> **effectiveness of any suggested sanction in bringing about the result desired.**
>
> It is a corollary of the above principle that a court which has returned a conviction for contempt must, **in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.** (Emphasis added)

The Eleventh Circuit's affirmance of the district court's civil contempt order is also in conflict with the Ninth Circuit Court of Appeals' opinion in Donovan v. Mazzola, 761 F.2d 1411, 1417 (9th Cir. 1985), that a present inability to comply is a complete defense to civil contempt, and the past ability to comply is not res judicata as to a continuing ability to comply.

As this Court held in United States v. Rylander, 460 U.S. 752 (1983), the ability to comply is a crucial inquiry for

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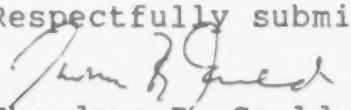
a court's decision concerning coercive civil contempt orders, and the court is required to weigh all the evidence properly before it determines whether or not there is actually a present ability to obey and whether failure to do so constitutes a deliberate defiance or wilfull disobedience which a coercive sanction will remedy. See also Maggio v. Zeitz, 333 U.S. 56, 76 (1948).

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,



Theodore B. Gould
pro se
P.O. Box 6279
Charlottesville, Virginia 22906
(804) 295-7125